

MARIA K. PUM (State Bar No. 120987)
KRISTEN E. CAVERLY (State Bar No. 175070)
HENDERSON & CAVERLY LLP
P.O. Box 9144 (all U.S. Mail)
16236 San Dieguito Road, Suite 4-13
Rancho Santa Fe, CA 92067-9144
Telephone: (858) 756-6342
Facsimile: (858) 756-4732
Email: mpum@hcesq.com

Attorneys for Plaintiff
McKESSON CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

McKESSON CORPORATION, a Delaware
corporation,

Plaintiff,

v.

FAMILYMEDS GROUP, INC.,
f/k/a Drugmax, Inc., a Connecticut corporation,

Defendant.

FAMILYMEDS GROUP, INC.,
f/k/a Drugmax, Inc., a Connecticut corporation,

Counter-Claimant,

v.

McKESSON CORPORATION, a Delaware
corporation,

Counter-defendant.

FAMILYMEDS, INC.,
a Connecticut corporation,

Cross-Complainant,

v.

McKESSON CORPORATION, a Delaware
corporation,

Cross-Defendant.

Case No. 4:07-cv-05715 WDB

**STATEMENT OF UNDISPUTED
FACTS IN SUPPORT OF McKESSON
CORPORATION'S MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Complaint filed: November 9, 2007
Cross-Complaint Filed: December 17, 2007

Date: August 6, 2008
Time: 1:30 p.m.
Place: Ctrm 4
1301 Clay St., 3d Floor
Oakland, CA

Pursuant to paragraph 11 of the Court's "Standing Order" and Civil Local Rule 56-2(b), Plaintiff and Counter-defendant McKESSON CORPORATION ("McKesson") and Defendant and Counterclaimant FAMILYMEDS GROUP, INC., f/k/a Drugmax, Inc. ("FM Group") have conferred regarding the list of undisputed facts set forth below, but FM Group has not stipulated to any of the facts. [Declaration of Kristen E. Caverly, dated June 4, 2008 at ¶¶ 3-8.] McKesson has advised FM Group that it will continue to be available to discuss stipulation to these facts as the time for FM Group's opposition nears.

MCKESSON'S UNDISPUTED MATERIAL FACTS

UNDISPUTED FACTS	EVIDENCE
1. On February 2, 2007, for fair and valuable consideration, McKesson and FM Group entered into a written contract entitled "Supply Agreement."	Supply Agreement at p.1 (Attached as <u>Exhibit A</u> to the Compendium of Exhibits; Authenticated by Ana Schrank Decl. ¹ at ¶3a).
2. Under the Supply Agreement, McKesson agreed to sell to FM Group, and FM Group agreed to buy, certain "Merchandise" described therein, including prescription drugs, so called "caps" and "vials" used in the sale of prescription drugs, and other health and beauty care products.	Supply Agreement at p. 1 at ¶1A (Attached as <u>Exhibit A</u> to the Compendium of Exhibits; Authenticated by Ana Schrank Decl. at ¶3a).
3. The Supply Agreement provides a term of three years commencing on December 28, 2006.	Supply Agreement at p. 1 at ¶2 (Attached as <u>Exhibit A</u> to the Compendium of Exhibits; Authenticated by Ana Schrank Decl. at ¶3a).

¹ Declaration of Ana Schrank, dated June 4, 2008 and filed herewith.

1 2 3 4	4. The Agreement was signed and executed by duly authorized representatives of both FM Group and McKesson.	Supply Agreement at p. 25 (Attached as <u>Exhibit A</u> to the Compendium of Exhibits; Authenticated by Ana Schrank Decl. at ¶3a).
5 6 7 8 9 10	5. Under the Supply Agreement, FM Group was required to make payment for Merchandise delivered to FM Group's retail pharmacies within seven days from the invoice date via Electronic Fund Transfer or Automated Clearing House.	Supply Agreement at p. 2 at ¶4A (Attached as <u>Exhibit A</u> to the Compendium of Exhibits; Authenticated by Ana Schrank Decl. at ¶3a).
11 12 13 14 15 16	6. Under the Supply Agreement, any payments made after the due date incurred a two percent (2%) (or the maximum amount permissible under applicable law, if lower) increase in the purchase price of the Merchandise.	Supply Agreement at p. 3 at ¶4E (Attached as <u>Exhibit A</u> to the Compendium of Exhibits; Authenticated by Ana Schrank Decl. at ¶3a).
17 18 19 20 21 22	7. Under the Supply Agreement, a one percent (1%) service charge (or the maximum amount permissible under applicable law, if lower) is imposed semi-monthly on all balances delinquent more than fifteen (15) days.	Supply Agreement at p. 3 at ¶4E (Attached as <u>Exhibit A</u> to the Compendium of Exhibits; Authenticated by Ana Schrank Decl. at ¶3a).
23 24 25 26 27 28	8. Under the Supply Agreement, FM Group agreed to render payment in full to McKesson on the applicable due date as specified in the Agreement without (i) making any deductions, short payments, or other accounts payable	Supply Agreement at p. 3 at ¶4F (Attached as <u>Exhibit A</u> to the Compendium of Exhibits; Authenticated by Ana Schrank Decl. at ¶3a).

1	adjustments to such obligation; or (ii) seeking to	
2	condition such remittance on any demand for or	
3	receipt of proofs of delivery.	
4		
5	9. Under the Supply Agreement, in addition to	Ana Schrank Decl. at ¶3k.
6	the 2% price increase and the 1% service charge,	
7	the price that FM Group must pay to McKesson	
8	for Merchandise increases as the volume of	
9	purchases decreases, and vice versa, across	
10	several levels of purchase volumes.	
11		
12	10. Under the Supply Agreement, FM Group's	Supply Agreement at p. 18 at ¶12A (Attached
13	failure to make any payment when due in	as <u>Exhibit A</u> to the Compendium of Exhibits;
14	accordance with the terms of the Agreement	Authenticated by Ana Schrank Decl. at ¶3a).
15	constitutes a material default.	
16		
17	11. The Supply Agreement embodies the entire	Supply Agreement at p. 22 at ¶17A (Attached
18	agreement between McKesson and FM Group	as <u>Exhibit A</u> to the Compendium of Exhibits;
19	and supersedes all prior agreements,	Authenticated by Ana Schrank Decl. at ¶3a).
20	understandings and representations with the	
21	exception of any promissory note, security	
22	agreement or other credit or financial related	
23	document(s) executed by FM Group or between	
24	FM Group and McKesson.	
25		
26	12. The Supply Agreement provides that it shall	Supply Agreement at p. 22 at ¶17E (Attached
27	be construed in accordance with the laws of the	as <u>Exhibit A</u> to the Compendium of Exhibits;
28		

1	State of California without regard to the	Authenticated by Ana Schrank Decl. at ¶3a).
2	provisions of Section 1654 of the California Civil	
3	Code or the rules regarding conflict of laws.	
4		
5	13. There is no written provision in the Supply	Ana Schrank Decl. at ¶31.
6	Agreement, which requires McKesson to provide	
7	an account to FM Group.	
8	14. McKesson has delivered the “Merchandise”	Ana Schrank Decl. at ¶4.
9	that FM Group ordered pursuant to the terms of	
10	the Supply Agreement.	
11		
12	15. As of October 31, 2007, McKesson had issued	Ana Schrank Decl. at ¶20.
13	invoices to FM Group totaling at least	
14	\$724,574.80, which remain unpaid.	
15		
16	16. As of May 30, 2008, FM Group owes	Ana Schrank Decl. at ¶21; May 30, 2008
17	McKesson \$814,419.44, excluding the earned	Statement for Familymeds Group, Inc.
18	volume discount, which is waived for purposes of	attached as Exhibit E to the Compendium of
19	McKesson Corporation’s instant Motion for	Exhibits (Authenticated by Leslie Morgan
20	Summary Judgment or, in the alternative,	Decl. ² at ¶10); Leslie Morgan Decl. at ¶¶ 1-22
21	Summary Adjudication.	(verifying invoiced amounts).
22		
23	17. On December 28, 2004, Familymeds, Inc.	Prime Warehouse Supplier Agreement at p.1
24	(“FM Inc.”) and Valley Drug Company South	(Attached as Exhibit B to the Compendium
25	(“Valley Drug”) entered into a written agreement	of Exhibits; Authenticated by Ana Schrank
26		

² Declaration of Leslie Morgan, Dated June 4, 2008.

1	entitled "Prime Warehouse Supplier Agreement"	Decl. at ¶15).
2	with D&K Healthcare Resources Inc. ("D&K").	
3		
4	18. On December 27, 2005, DrugMax, Inc.	First Amendment To Prime Warehouse
5	("DrugMax") and FM Inc. entered into a written	Supplier Agreement at p.1 (Attached as
6	agreement entitled "First Amendment To Prime	<u>Exhibit C</u> to the Compendium of Exhibits;
7	Warehouse Supplier Agreement" with D&K.	Authenticated by Ana Schrank Decl. at ¶15).
8		
9	19. McKesson was not a signatory to the Prime	Prime Warehouse Supplier Agreement at p. 6
10	Warehouse Supplier Agreement.	(Attached as <u>Exhibit C</u> to the Compendium
11		of Exhibits; Authenticated by Ana Schrank
12		Decl. at ¶15); Ana Schrank Decl. at ¶15.
13		
14	20. McKesson was not a signatory to the First	First Amendment To Prime Warehouse
15	Amendment To Prime Warehouse Supplier	Supplier Agreement at pp. 13-14 (Attached as
16	Agreement.	<u>Exhibit C</u> to the Compendium of Exhibits;
17		Authenticated by Ana Schrank Decl. at ¶15);
18		Ana Schrank Decl. at ¶15.
19		
20	21. McKesson and D&K are separate corporate	Ana Schrank Decl. at ¶14.
21	entities.	
22		
23	22. In August 2005, McKesson acquired the stock	Ana Schrank Decl. at ¶14.
24	of D&K.	
25		
26	23. On May 5, 2008, the Court dismissed FM Inc.	"Order Re May 5, 2008, Case Management
27	as a party in this action.	Conference" dated May 5, 2008 at p. 2: lines
28		5-6 (Attached as <u>Exhibit K</u> to the
		Compendium of Exhibits; Authenticated by

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Declaration of Kristen E. Caverly, dated June 4, 2008, at ¶ 2).
--	---

DATED: June 4, 2008.

HENDERSON & CAVERLY LLP

By: 

Maria K. Purn
Attorneys for McKesson Corporation